

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

and

NATALYA PRACH, IVAN KRIGER,
ANDREY SAMOLOVOV, AND ANATOLIY
TSIRIBKO, and NORTHWEST FAIR
HOUSING ALLIANCE,

Plaintiffs-
Intervenors

V.

BOWEN PROPERTY MANAGEMENT,
SPOKANE HOUSING AUTHORITY,
WESTFALL VILLAGE APARTMENTS,
L.P., JOHN BALLAS, AND KERREY
LEMONS.

Defendants.

NO. CV-03-0250-EFS

ORDER DENYING BOWEN PROPERTY
MANAGEMENT'S MOTION FOR
SUMMARY JUDGMENT AND
GOVERNMENT'S MOTION TO
STRIKE AND REQUIRING PARTIES
TO PARTICIPATE IN
ALTERNATIVE DISPUTE
RESOLUTION

BOWEN PROPERTY MANAGEMENT,
SPOKANE HOUSING AUTHORITY,
WESTFALL VILLAGE APARTMENTS,
L.P., JOHN BALLAS, AND KERREY
LEMONS.

Defendants.

A telephonic hearing was held in the above-captioned case on June 28, 2005. Avery Johnson and Bert Daughtry appeared on behalf of the United States; Jeffry Finer appeared on behalf of Natalya Prach; Chris Grimes appeared on behalf of the other Plaintiffs-Intervenors; Julian St. Marie appeared on behalf of the Northwest Fair Housing Alliance; Michael Parker appeared on behalf of Kerrey Lemons; and Eric Steven

1 appeared on behalf of Bowen Property Management and John Ballas. Before
 2 the Court were Defendant Bowen Property Management's Motion for Summary
 3 Judgment, (Ct. Rec. 162), and Plaintiff United States' Motion to Strike
 4 Defendant Bowen Property Management's Reply Memorandum in Support of
 5 Motion for Summary Judgment or, Alternatively, for Leave to File
 6 Surreply, (Ct. Rec. 196). After reviewing the submitted material and
 7 applicable statutory and case law and taking oral argument, the Court
 8 is fully informed. This Order serves to supplement and memorialize the
 9 Court's oral denial of both the Defendant's and United States' motions.

10 **I. DEFENDANT BOWEN PROPERTY MANAGEMENT'S MOTION FOR SUMMARY JUDGMENT**

11 Defendant Bowen Property Management ("Bowen") seeks an order
 12 granting summary judgment in its favor on the grounds that no genuine
 13 triable issues of material fact exist because the facts show (1) Kerrey
 14 Lemons was acting outside the scope of her employment and thus Bowen is
 15 not vicariously liable, (2) the intent of the Fair Housing Act would be
 16 frustrated if Natalia Prach, Ivan Kriger, Andrey Samolovov, and Anatoliy
 17 Tsiribko were allowed to proceed as Congress did not intend to protect
 18 illegal conduct under the Fair Housing Act, and (3) Anatoliy Tsiribko
 19 cannot maintain his action because he did nothing to secure rights under
 20 the Fair Housing Act. Natalya Prach filed an opposition to the motion,¹
 21 to which the Northwest Fair Housing Alliance joined. In addition,
 22 Plaintiffs-Intervenors Mr. Kriger, Mr. Samolovov, and Mr. Tsirbko
 23 (hereinafter referred to as "Plaintiffs-Intervenors" filed an

24
 25
 26 ¹ At the hearing, Bowen withdrew its request to strike Ms. Prach's opposition as untimely.

1 opposition.² The United States also filed an opposition. Following,
 2 Bowen filed two replies; in response to the second reply, the United
 3 States filed a Motion to Strike Bowen's second reply.³

4 **A. Statement of Uncontroverted Facts⁴**

5 Bowen is an Oregon corporation doing business in the State of
 6 Washington. Bowen managed the Westfall Village Apartments ("Westfall
 7 Village"), located at 3724 N. Cook Street in Spokane, Washington, from
 8 their initial rent-up in mid-1997 through June 2002.⁵ During the time
 9 period relevant to this action, Defendant John Ballas was the vice
 10 president and general manager of operations for Bowen. Defendant Kerrey
 11 Lemons was employed by Bowen as the rental manager at Westfall Village

12

13 ² At the hearing, Bowen withdrew its request to strike Ms. Prach's
 14 opposition as untimely.

15 ³ The Court finds it unnecessary to strike Bowen's reply and
 16 determines additional briefing is unnecessary as the issues are fully
 17 before the Court.

18 ⁴ The Statement of Uncontroverted Facts was agreed to by the
 19 parties, (Ct. Rec. 203). Given that the parties' jointly agree as to
 20 these facts, and the Court finds that such material facts exist without
 21 substantial controversy, such facts are deemed established under Federal
 22 Rule of Civil Procedure 56(d).

23 ⁵ The Spokane Housing Authority did not renew or extend its
 24 contract with Bowen to manage the Westfall Village Apartments when it
 25 expired in June 2002. The apartments at Westfall Village are dwellings
 26 within the meaning of 42 U.S.C. § 3602(b).

1 from April 1997 through June 2002. Mr. Ballas was one of Ms. Lemons'
2 supervisors during the time period relevant to this action. Mr. Ballas
3 visited Westfall Village periodically and met on occasion with Ms.
4 Lemons to review the operation of the apartments.

5 As the rental manager, Ms. Lemons' responsibilities included, but
6 were not limited to, reviewing rental applications and submitting
7 applications for tenancy to Bowen for final approval, as well as
8 accepting and depositing payments for application fees, deposits, and
9 rent. In or around September 1999, Natalya Prach, a tenant at Westfall
10 Village, began working for Bowen at Westfall Village. Ms. Prach is of
11 Russian national origin. She speaks Russian and also speaks English to
12 some degree. Kerrey Lemons was Ms. Prach's on-site supervisor. Ms.
13 Prach's compensation as assistant manager was made in part in the form
14 of a credit against her monthly rent at Westfall Village.

15 On or about May 30, 2000, Ms. Prach called John Ballas and alleged
16 that Ms. Lemons was soliciting and obtaining additional fees from
17 Russian applicants and tenants in exchange for giving them apartments
18 over other applicants. Mr. Ballas informed Ms. Lemons of Ms. Prach's
19 allegations by telephone. Ms. Prach contacted Mr. Ballas again by
20 telephone on May 31, 2000, and retracted her prior allegations about Ms.
21 Lemons. On May 31, 2000, there was a meeting at Westfall Village which
22 the following persons attended: Natalya Prach, Ivan Kriger,⁶ Andrey
23

24
25 ⁶ Plaintiff-Intervenor Ivan Kriger is of Russian national origin
26 and speaks Russian and English. Mr. Kriger has never been a resident at
Westfall Village.

1 Samolovov,⁷ Anatoliy Tsiribko,⁸ Llyudmila Greben, Irena Greben, Kerrey
 2 Lemons, and Glen Lemons. On June 1, 2000, Ms. Prach again called Mr.
 3 Ballas and told him that the allegations she made against Ms. Lemons in
 4 her first call to him on May 30 were true.

5 Mr. Ballas kept his superiors at Bowen informed of the events that
 6 occurred from May 30 through June 1, 2000, as they occurred during those
 7 three days, and discussed with them what action, if any, Bowen should
 8 take. Soon after June 1, 2000, Mr. Ballas authorized a notice of
 9 termination of tenancy to be issued to Ms. Prach. In June, 2000, the
 10 Northwest Fair Housing Alliance⁹ (NWFHA) received complaints from Ms.
 11 Prach and others alleging that the Defendants had violated the Fair
 12 Housing Act by discriminating on the basis of national origin -
 13 specifically, that Ms. Lemons charged persons of Russian origin special
 14 "fees" to process their application for new housing and for transfers.

15 _____
 16 ⁷ Plaintiff-Intervenor Andrey Samolovov is of Russian national
 17 origin and speaks Russian and some English. Mr. Samolovov has never been
 18 a resident at Westfall Village.

19 ⁸ Plaintiff-Intervenor Anatoliy Tsiribko is of Russian national
 20 origin and speaks Russian and some English. During the relevant time
 21 period, Mr. Tsiribko lived with Ms. Prach at Westfall Village.

22 ⁹ NWFHA is a non-profit organization whose purpose is to ensure
 23 equal housing opportunity for the people of Eastern Washington through
 24 education, counseling, and advocacy. NWFHA's mission included
 25 investigating and responding to complaints relating to violations of the
 26 Fair Housing Act.

1 NWFHA helped Ms. Prach and other Russian nationals including Vera
2 Filipenko, Irina and Vladimir Greben, and Mikhail and Nadya Azarov file
3 complaints of housing discrimination with the United States Department
4 of Housing and Urban Development (HUD) on or around July 11 and 13,
5 2000.

6 Ms. Prach and Plaintiff-Intervenors Ivan Kriger, Andrey Samolovov,
7 and Anatoliy Tsiribko were arrested on or about September 6, 2000.
8 These individuals were jailed for one day after their arrest and
9 subsequently pled guilty to misdemeanor disorderly conduct and were
10 sentenced to one year probation.

11 Bowen retained Ms. Lemons as a resident manager at Westfall Village
12 until June 2002 when its management responsibilities there ended. After
13 leaving Westfall Village, Ms. Lemons has remained employed by Bowen in
14 other capacities continuously to this date.

15 **B. Applicable Law & Analysis¹⁰**

16 1. Bowen's Liability: Direct or Vicarious

17 Bowen maintains it is not directly or vicariously liable because
18 Ms. Lemons' alleged wrongful acts were outside the scope of her
19

20 ¹⁰ The Court grants the United States and Plaintiffs-Intervenors'
21 request to strike the Declaration of Pat Youngren because it contains
22 inadmissible hearsay. The material on the bottom half of page 2 to the
23 top half of page 3 is STRICKEN pursuant to Federal Rule of Civil
24 Procedure 56(e) because Ms. Young does not have first-hand knowledge of
25 the telephone calls or the May 31, 2000, meeting.

1 employment. The Court agrees with Plaintiffs and finds genuine issues
 2 of material fact exist as to whether Bowen is directly and/or
 3 vicariously liable for Mr. Ballas' or Ms. Lemons' alleged wrongful acts.

4 a. *Direct Liability*

5 The Fair Housing Act, which was enacted to insure that people who
 6 historically suffered from discrimination in the housing markets to have
 7 an equal opportunity to housing, does not statutorily define the scope
 8 of a principal's liability. *People Helpers, Inc. v. City of Richmond*,
 9 789 F. Supp. 725, 731 (E.D. Va. 1992). However, the parties agree that
 10 traditional principles of agency law are to be applied to the Fair
 11 Housing Act. See *Meyer v. Holley*, 537 U.S. 280, 285-86 (2003); *Faragher*
 12 *v. City of Boca Raton*, 524 U.S. 775, 793 (1998); RESTATEMENT (SECOND) AGENCY
 13 §§ 219(1)-(2) & 228.

14 Initially, the Court notes there is no evidence supporting a
 15 finding that Bowen is directly liable for taking the alleged bribes.
 16 However, the Court finds a genuine issue of material fact exists as to
 17 whether Mr. Ballas, a principal of Bowen, engaged in conduct under 42
 18 U.S.C. § 3617:

19 It shall be unlawful to coerce, intimidate, threaten or
 20 interfere with any person in the exercise or enjoyment of, or
 21 on the account of his having aided or encouraged any other
 22 person in the exercise or enjoyment of, any right granted
 23 under or protected by §§ 3603, 3604, 3605 or 3606 of this
 24 Title.

25 Mr. Ballas stated at his deposition he had heard from Mr. Zarebelov, a
 26 Bowen employee who spoke Russian, that two residents agreed with Ms.
 27 Prach's version of the story. (Ballas Dep. pp. 63-68 & 73-74.) However,
 28 without researching these accounts further, or providing the police with
 29 this information, Mr. Ballas decided to terminate Ms. Prach's employment

1 prior to the police finishing its investigation. *Id.* pp. 95-98, 119-
 2 136, & 189. Then, when the police decided not to pursue the
 3 investigation further, Mr. Ballas agreed to have a notice of eviction
 4 served on Ms. Prach. (Prach Decl. ¶ 18; Lemons Dep. p. 331.)
 5 Accordingly, the Court finds a question of fact for the jury exists as
 6 to whether Mr. Ballas' intimidated, threatened, or interfered with Ms.
 7 Prach's alleged attempts to prevent FHA violations, thereby making Bowen
 8 directly liable.¹¹

9 b. *Vicarious Liability*

10 The Court concludes Plaintiffs presented sufficient evidence to
 11 show that Bowen may be vicariously liable for Ms. Lemons' alleged
 12 bribery. Agency authority can be expressed, implied, or apparent; yet,
 13 the parties disagreement is centered on whether Ms. Lemons had implied
 14 or apparent authority and whether Bowen should be responsible even if
 15 Ms. Lemons acted outside the scope of her employment.

16 Implied authority generally exists when conduct is done within the
 17 course and scope of employment. *Faragher v. City of Boca Raton*, 524
 18 U.S. 775, 793 (1998) (citing to RESTATEMENT (SECOND) AGENCY § 219(1)).
 19 "Within the course and scope of employment" means: (1) the conduct

21 ¹¹ Bowen also maintains it cannot be held liable for any damages
 22 associated with Ms. Prach and Mr. Tsiribko moving out of the Westfall
 23 Village because Bowen was not a party to the Plea Agreements. However,
 24 the Court finds this argument fails to recognize that Bowen served an
 25 eviction notice on Ms. Prach approximately one year before these
 26 individuals entered into a Plea Agreement.

1 occurred substantially within the authorized employment time and space
 2 limits; (2) the employee was motivated, at least in part, by a purpose
 3 to serve the employer; and (3) the act was of a kind that the employee
 4 was hired to perform. RESTATEMENT (SECOND) AGENCY § 228. "Apparent
 5 authority arises from the principal's manifestations to a third party
 6 that supplies a reasonable basis for that party to believe that the
 7 principal has authorized the alleged agent to do the act in question."
 8 *Id.* at 1099. The existence of an agency relationship and the scope of
 9 the agent's authority is a question of fact and should not be decided
 10 on summary judgment, unless only one conclusion can be drawn. *C.A.R.*
 11 *Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474 (9th
 12 Cir. 2000). Restatement (Second) of Agency § 219(2) provides:

13 A master is not subject to liability for torts of his
 14 servants acting outside the scope of their employment,
 unless:

- 15 (a) the master intended the conduct or the consequences, or
- (b) the master was negligent or reckless, or
- (c) the conduct violated a non-delegable duty of the master,
 16 or
- (d) the servant purported to act or to speak on behalf of the
 17 principal and there was reliance upon apparent authority, or
 he was aided in accomplishing the tort by the existence of
 18 the agency relationship.

19 See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998).

20 Accepting cash bribes was not one of Ms. Lemons' listed
 21 responsibilities. Yet, the parties did jointly agree Ms. Lemons was
 22 responsible for accepting new applications, reviewing them, and
 23 submitting applications to Bowen for final approval, as well accepting
 24 and depositing application fees, deposits, and rent. (Ct. Rec. 203 ¶ 9.)
 25 Due to these money-related and tenancy-selection responsibilities, the
 26 Court finds a genuine issue of material facts exists as to whether

1 primarily Russian-speaking individuals would reasonably know it was not
2 within Ms. Lemons' scope of employment, and/or within her apparent
3 authority, to accept additional cash fees, especially in light of Ms.
4 Lemons' acknowledgment at her deposition that she had accepted cash for
5 legitimate rental costs, in violation of the sign alleged posted "OUR
6 POLICY IS THAT WE DO NOT ACCEPT CASH FOR PAYMENT."¹² For these reasons,
7 the Court concludes the jury should determine whether such conduct was
8 within Ms. Lemons' scope of employment, whether Ms. Lemons purported to
9 act on behalf of Bowen and whether the alleged payers of these payments
10 relied upon this apparent authority, whether Ms. Lemons was aided by the
11 existence of the agency relationship, and whether Bowen was benefitted
12 by Ms. Lemons' conduct.

13 In its defense, Bowen at trial will have an opportunity to present
14 evidence that it "exercised reasonable care" to avoid such unlawful
15 payments and to "eliminate it when it might occur" and discuss whether
16 the Plaintiffs' conduct was reasonable. See *Faragher*, 524 F.2d at 805
17 (establishing such an affirmative defense in the context of Title VII);
18 *Congdon v. Strine*, 854 F. Supp. 355 (E.D. Penn. 1994).

19 For the reasons given above, the Court finds the jury is to
20 determine whether Bowen is directly liable for the termination and
21 eviction notice and/or vicariously liable for Ms. Lemons' alleged
22 wrongdoings. Accordingly, the Court denies Bowen's motion in part.

¹² The Court highlights Mr. Ballas did not state whether this sign was posted in a visible place during the relevant time period and/or whether a Russian interpretation was provided.

1 2. Protecting Illegal Conduct

2 Bowen submits allowing Plaintiffs to proceed in this matter and
3 recover for engaging in illegal conduct will frustrate the policy and
4 purpose of the Fair Housing Act because Plaintiffs' underlying conduct
5 was illegal as is evidenced by Plaintiffs' disorderly conduct guilty
6 pleas, citing to *Barlow v. Evans*, 993 F. Supp. 1390 (C.D. Utah 1997).
7 The Court finds *Barlow* is distinguishable.

8 The district court in *Barlow* determined that a buyer practicing
9 polygamy did not have standing to assert a violation of the Fair Housing
10 Act when a seller decided not to sell a particular parcel to the buyer
11 due to the buyer's polygamy practice. The district court reached this
12 conclusion after observing that the Fair Housing Act's purpose was not
13 to assist in engaging in criminal behavior and the First Amendment does
14 not provide religious protection to polygamy practices.

15 The Court agrees the Fair Housing Act's purpose is not to aid or
16 abet criminal behavior. However, unlike *Barlow*, the Plaintiffs'
17 misdemeanor conviction for disorderly conduct is separate and distinct
18 from Ms. Lemons' alleged acceptance of bribes, the termination of Ms.
19 Prach's employment, and the eviction notice sent to Ms. Prach. The
20 alleged bribes were received prior to May 30, 2000. Even though the
21 disorderly conduct guilty pleas may have been based on, in part, the
22 individuals' conduct at the May 30, 2000, meeting, the termination of
23 Ms. Prach was, according to Mr. Ballas, due to her inconsistent stories
24 and not based on her conduct at that meeting as he was not present for
25 such. (Ballas Dep. pp. 95-87 & 119-136.) Furthermore, the eviction
notice was reportedly related to her termination as she was no longer

1 receiving rent credit for her work hours. (Prach Decl. ¶ 18; Lemons
 2 Dep. p. 331.) Accordingly, the Court finds Plaintiffs are not seeking
 3 to promote disorderly conduct, but rather seek to redress unfair housing
 4 practices against Russian immigrants and the steps taken by Defendants
 5 to suppress the Plaintiff-Intervenors protected activities. *See People*
 6 *Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725 (E.D. Va. 1992).
 7 For these reasons, the Court denies Bowen's motion in part.

8 3. Anatoliy Tsiribko

9 Lastly, Bowen argues Mr. Tsiribko cannot maintain an action because
 10 he did not secure his rights under the Fair Housing Act because he
 11 admitted during his deposition that he did not talk to anyone or pay
 12 money. At his deposition, in response to the question of "[w]hat
 13 specific things did you do to help tenants at Westfall Village recover
 14 their extra money paid to Kerrey Lemons?", (Tsiribko Dep. p. 61), Mr.
 15 Tsiribko responded, "[e]verything that I did I signed that I was
 16 against. I did not talk to anyone and I did not go with anyone. I went
 17 to jail. Can you imagine what would have been if I would have done
 18 something?" *Id.* at 61-62.

19 At the deposition, counsel for Mr. Tsiribko objected to this
 20 question as calling for a legal conclusion. Mr. Tsiribko speaks Russian
 21 primarily and thus an interpreter was used at the deposition. The Court
 22 concludes this statement does not dispose of Mr. Tsiribko's claims,
 23 given the difficulty in ascertaining the specific meaning of answers
 24 given at depositions where an interpreter is used and follow-up
 25 questions on this issue were not asked. Furthermore, the undisputed
 26 evidence establishes Mr. Tsiribko was present at the May 30, 2000,

1 meeting. Accordingly, if the jury believes Plaintiffs' version of the
2 facts that the purpose of this meeting was to advise Ms. Lemons that she
3 needed to return the bribe money, then the jury could find that Ms.
4 Lemons instigated an investigation to "coerce, intimidate, threaten or
5 interfere with any person in the exercise or enjoyment of, or on the
6 account of his having aided or encouraged any other person in the
7 exercise or enjoyment of, any right granted under or protected by [the
8 Fair Housing Act]." This investigation led to criminal charges against
9 Mr. Tsiribko. Accordingly, the Court denies Bowen's motion in part.

10 4. Conclusion

11 The Court denies Bowen's Motion for Summary Judgment, finding
12 genuine issues of material fact exist as to whether Bowen is directly
13 liable for Mr. Ballas' conduct and/or indirectly liable for Ms. Lemons'
14 alleged unlawful conduct. Accordingly, the Court denies Bowen's request
15 for attorney fees and costs as well.

16 For the reasons given above, **IT IS HEREBY ORDERED:**

17 1. Plaintiff United States' Motion to Expedite their Motion to
18 Strike Defendant Bowen Property Management's Reply Memorandum in Support
19 of Motion for Summary Judgment or, Alternatively, for Leave to File
20 Surreply (**Ct. Rec. 189**), is **GRANTED**.

21 2. Defendant's Bowen Property Management's Motion for Summary
22 Judgment, (**Ct. Rec. 162**), is **DENIED**.

23 3. Plaintiff United States' Motion to Strike Defendant Bowen
24 Property Management's Reply Memorandum in Support of Motion for Summary
25 Judgment or, Alternatively, for Leave to File Surreply, (**Ct. Rec. 196**),
26 is **DENIED**.

4. The Parties shall engage in some form of alternative dispute resolution by the end of August 2005. If the parties jointly agree to utilize a mediator other than the federal magistrate judge, the parties shall advise the Court of such selection in writing.

5. The Statement of Uncontroverted Facts is deemed established under Federal Rule of Civil Procedure 56(d).

IT IS SO ORDERED. The District Court Executive is directed to:

- (1) Enter this Order,
- (2) Provide copies to counsel.

DATED this 15th day of August, 2005.

s/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

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